Techbay Sdn Bhd & Ors v Medicbilt Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02(NCVC)(W)-1970–10 OF 2017 AND S-02(NCVC)(W)-2031–10 OF 2017
VERNON ONG, ABDUL RAHMAN SEBLI AND STEPHEN CHUNG JJCA
4 APRIL 2019

Contract — Damages — Breach — Assessment of damages — Plaintiff company awarded damages based on percentage of contract value — Appeal against award — Whether there existed valid agreement between first defendant and plaintiff company to sub contract whole of QEH project to plaintiff company — Whether terms of agreement had been breached by first defendant — Whether learned trial judge was plainly wrong in deciding in favour of plaintiff company

The appellants in Appeal No S-02(NCVC)(W)-1970–10 of 2017 were the first, second and third defendants respectively at the trial whereas the appellant in Appeal No S-02(NCVC)(W)-2031–10 of 2017 was the fourth defendant. The respondents in both appeals was the plaintiff company. The defendants' appeal was against the decision of the Kota Kinabalu High Court allowing all of the plaintiff company's claims against the defendants as well as costs of RM108,000. The plaintiff company had also cross-appealed against the decision of the High Court allowing for a deduction of RM9,228,229.12 from its total claim. The plaintiff company's claim against the first defendant was for breach of a subcontract agreement dated 16 August 2010 ('the subcontract agreement') in respect of a contract ('the main contract') awarded to the first defendant by the Ministry of Health to construct the tower block of the Queen Elizabeth Hospital Package 4 ('the QEH project') for a contract sum of RM364,853,813.50. As for the second, third and fourth defendants, the plaintiff company's claim against them was for breach of their statutory duties owed to the plaintiff company.

Held, dismissing the appeals and cross-appeal:

(1) The failure by the learned judge to refer to cl 4.1A did not detract from the fact that he had found the subcontract agreement to be in existence and was binding on the first defendant. This finding was made independent of cl 4.1A (see para 58).

(2) Although Appendix 1 appeared to be poorly worded, it nevertheless set out, in the context of the subcontract agreement, the complete scope of works under the agreement and the total subcontract price. It even set out

the estimated cost of completing some of the items of works and the corresponding estimated profits to be made by the plaintiff company from each of the items of work (see para 64).

(3) The award of damages based on a percentage of the contract value was accepted by the court in *Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593. There was nothing unjust for the learned judge to award the plaintiff company damages for the loss of profit which it was entitled to under the subcontract agreement (see paras 73 & 76).

(4) The learned trial judge's finding that the lobbying fees were in fact paid was amply supported by the evidence. The court agreed with the defendants' explanation that the reason why they did not call Datuk Bung Mokhtar to give evidence was because Datuk Bung Mokhtar would never admit to receiving the lobbying fees, and not because they wanted to suppress evidence. The learned judge was right in the circumstances in not invoking adverse inference under s 114(g) of the Evidence Act 1950 against the defendants for not calling Datuk Bung Mokhtar (see paras 87–88).

[Bahasa Malaysia summary

Perayu dalam Rayuan No S-02(NCVC)(W)-1970–10 Tahun 2017 masing-masing adalah defendan pertama, kedua dan ketiga ketika perbicaraan manakala perayu dalam Rayuan No S-02(NCVC)(W)-2031–10 Tahun 2017 adalah defendan keempat. Responden dalam kedua-dua rayuan adalah syarikat plaintif. Rayuan defendan adalah terhadap keputusan Mahkamah Tinggi Kota Kinabalu yang membenarkan semua tuntutan syarikat plaintif terhadap defendan serta kos RM108,000. Syarikat plaintif juga telah merayu balaas terhadap keputusan Mahkamah Tinggi yang membenarkan potongan sebanyak RM9,228,229.12 daripada jumlah tuntutannya. Tuntutan syarikat plaintif terhadap defendan pertama adalah kerana pelanggaran perjanjian sub-kontrak bertarikh 16 Ogos 2010 ('perjanjian subkontrak') berkenaan kontrak ('kontrak utama') yang diberikan kepada defendan pertama oleh Kementerian Kesihatan untuk membina blok menara Queen Elizabeth Hospital Package 4 ('projek QEH') untuk jumlah kontrak sebanyak RM364,853,813.50. Bagi defendan kedua, ketiga dan keempat, tuntutan syarikat plaintif terhadap mereka adalah kerana pelanggaran kewajipan statutori kepada syarikat plaintif.

Diputuskan, menolak rayuan-rayuan dan rayuan balas:

(1) Kegagalan oleh hakim yang bijaksana untuk merujuk kepada klausa 4.1A tidak mengurangkan hakikat bahawa beliau telah mendapati perjanjian subkontrak wujud dan mengikat defendan pertama. Dapatan ini dibuat bebas daripada klausa 4.1A (lihat perenggan 58).

(2) Walaupun Lampiran 1 kelihatan tidak disusun dengan baik, namun ia

menyatakan, dalam konteks perjanjian subkontrak, skop kerja yang lengkap di bawah perjanjian dan jumlah harga sub kontrak. Ia juga menetapkan kos anggaran untuk menyelesaikan beberapa hasil kerja dan anggaran keuntungan yang sepatutnya dibuat oleh syarikat plaintif dari setiap hasil kerja (lihat perenggan 64).

(3) Award ganti rugi berdasarkan peratusan nilai kontrak diterima oleh mahkamah di *Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593. Tidak ada yang tidak adil bagi hakim yang bijaksana untuk memberi ganti rugi kepada syarikat plaintif untuk kehilangan keuntungan yang ia berhak di bawah perjanjian subkontrak (lihat perenggan 73 & 76).

(4) Penemuan hakim bicara yang bijaksana bahawa bayaran melobi sebenarnya dibayar dengan cukup disokong oleh keterangan. Mahkamah bersetuju dengan penjelasan defendan bahawa alasan mengapa mereka tidak memanggil Datuk Bung Mokhtar untuk memberikan keterangan adalah kerana Datuk Bung Mokhtar tidak akan mengakui menerima bayaran melobi, dan bukan kerana mereka mahu menyembunyikan bukti. Hakim yang bijaksana adalah betul dalam keadaan yang tidak menggunakan tanggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap defendan kerana tidak memanggil Datuk Bung Mokhtar (lihat perenggan 87–88).]

Notes

For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4951–4984.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b, PC (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd)
Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd [2011] 4 MLJ 593, CA (refd)

Legislation referred to

Contracts Act 1950 s 74(1)
Evidence Act 1950 s 114(g)

Marina Tiu (Joan Goh with her) (Goh & Assoc) for the first, second and third appellants.
PK Lim (PK Lim & Co) for the fourth appellant.
Raymond Szetu (Rebecca Thong Fei Eng with him) (Szetu & Co) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before us, namely Appeal No S-02(NCVC)(W)-1970–10 of 2017 and Appeal No S-02(NCVC)(W)-2031–10 of 2017. The appellants in the first appeal were the first, second and third defendants respectively at the trial whereas the appellant in the second appeal was the fourth defendant. The respondents in both appeals was the plaintiff. For convenience, we shall refer to the parties as they were in the court below, ie the appellants in both appeals as the first, second, third and fourth defendants and the respondents in both appeals as the plaintiff company.

[2] The defendants' appeal was against the decision of the Kota Kinabalu High Court allowing all of the plaintiff company's claims against the defendants as well as costs of RM108,000. The plaintiff company had also cross-appealed against the decision of the High Court allowing for a deduction of RM9,228,229.12 from its total claim.

[3] The plaintiff company's claim against the first defendant was for breach of a subcontract agreement dated 16 August 2010 ('the subcontract agreement') in respect of a contract ('the main contract') awarded to the first defendant by the Ministry of Health to construct the tower block of the Queen Elizabeth Hospital Package 4 ('the QEH project') for a contract sum of RM364,853,813.50.

[4] As for the second, third and fourth defendants, the plaintiff company's claim against them was for breach of their statutory duties owed to the plaintiff company.

THE HIGH COURT ORDERS

[5] At the conclusion of the trial after 20 days of hearing, the learned trial judge found in favour of the plaintiff company and accordingly made the following orders against the defendants:

(a) the first, second, third and fourth defendants jointly and severally pay to the plaintiff company 'the agreed profits' of the QEH project under prayer (i) in the sum of RM60,343,970.88;

(b) the first, second, third and fourth defendants jointly and severally account to the plaintiff company for prayer (ii) the amount of which shall be assessed before the deputy registrar;

(c) the first, second, third and fourth defendants hold the 'agreed profits' and the 'other profits' as constructive trustees for the benefit of the plaintiff company as prayed for in prayer (iii);

(d) the plaintiff company may trace all profits including the 'agreed profits' and the 'other profits' which are held in trust for the plaintiff, into property, investment or assets whatsoever of the the first, second, third and fourth defendants as prayed for in prayer (iv);

(e) statutory interest at the rate of 5%pa shall be payable on all sums awarded from the date of judgment/award until the date of full settlement;

(f) the first, second and third defendants shall pay the plaintiff company an agreed cost of RM108,000 subject to payment of 4% allocator;

(g) the fourth defendant shall pay to the plaintiff company an agreed cost of RM30,000 subject to payment of 4% allocator; and

(h) the parties shall be at liberty to apply.

[6] The decision effectively means that the nett profit that the first defendant obtained as the main contractor for the QEH project under the main contract was the profit that the plaintiff company would have gained under the subcontract agreement and that the defendants were therefore liable to account for that profit as well as other profits for additional works not covered by the QEH project sum.

[7] The amount of profit from the QEH project which the plaintiff company claimed it was deprived of by the defendants was RM69,572,200.

[8] Having heard arguments by all three parties, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

THE PLAINTIFF'S CASE

[9] The plaintiff company's pleaded case against the defendants was that sometime in early 2009, the second, third and fourth defendants together with Mr Kwan Ngeh Wah ('Mr Kwan') (PW5) agreed to work together towards procuring for the first defendant an award by the Ministry of Health, Malaysia of the QEH project and thereafter to procure the award of a subcontract of the said project works from the first defendant to the plaintiff company.

[10] Pursuant to the agreement, the plaintiff company was then duly incorporated with the second, third and fourth defendants together with Mr Kwan as the directors and shareholders.

[11] On or about 31 May 2010, the Ministry of Health awarded the QEH project to the first defendant for the said contract sum of RM364,853,813.50.

[12] By a subcontract agreement dated 16 August 2010, the first defendant subcontracted the whole of the QEH project to the plaintiff company. This was disputed by the defendants, in spite of an admission by the defendants' own witness, Yong Meu Fah (DW2) under cross-examination by Mr Raymond Szetu for the plaintiff company that the plaintiff company was incorporated in 2009 for the specific purpose of carrying out the QEH project in anticipation of the project being awarded to the first defendant.

[13] DW2 further agreed with learned counsel that the first defendant had agreed to subcontract the whole of the QEH project to the plaintiff company and that the plaintiff company would keep the profits and subsequently distribute the profits to the shareholders, with Mr Kwan and the second and third defendants having 30% share and the fourth defendant 10% share. According to DW2, that would represent their respective shareholdings in the plaintiff company.

[14] The plaintiff also relied on the unchallenged witness statement of Mr Kwan to prove that the QEH project was subcontracted to the plaintiff company. His statement was to the following effect:

(a) that the plaintiff was entitled to all the monies due from the employer the first defendant. This means all the works under the main contract that was awarded to the first defendant had to be carried out by the plaintiff as the subcontractor;

(b) that 'civil and building works' covering items 'preliminary, building and external works' (under items 1, 2 and 3) would actually be carried out by the plaintiff and the remainder to be further subcontracted out by the plaintiff to third parties; and

(c) that the profits would remain with the plaintiff.

[15] There was also the evidence of the fourth defendant who admitted under cross-examination that the whole works under the main contract had been subcontracted to the plaintiff company. His Q&A proceeded as follows:

PUT	... PUT that pursuant to this Sub-Contract Agreement, Techbay had sub-contracted the whole works under the Main Contract to Medicbilt at the whole of the Main Contract Sum.
A	Yes.

[16] Additionally, the evidence shows that the plaintiff company had resolved to give an irrevocable instruction to UOB Bank to pay into the

plaintiff company's account all proceeds from the QEH project. It was argued by the plaintiff company that if it was entitled to all the monies payable from the employer, surely the scope of works for which the plaintiff company was responsible for and for which it was entitled to the profits must be the whole of the scope of works awarded by the employer under the QEH project.

MAIN CONTRACT COMPLETED BY THE FIRST DEFENDANT

[17] It was undisputed that the main contract was completed by the first defendant and not by the plaintiff company. The plaintiff company's case however was that in breach of the subcontract agreement, the first defendant proceeded to manage, carry on and complete the QEH project without subcontracting it to the plaintiff company and retained all profits therefrom, including profits that had been agreed between the plaintiff company and the first defendant. It was alleged that the first defendant refused to allow the plaintiff and its representatives, servants or agents to take possession and control of the site.

THE DEFENDANTS' CASE

[18] As for the defendants, their pleaded case was that there was no agreement for the subcontract of the QEH project to the plaintiff, let alone (as asserted by the plaintiff) that the whole of the QEH project was subcontracted to the plaintiff company. According to the defendants, the actual agreement on the QEH project was not between the plaintiff company and the first defendant but between the second to the fourth defendants and Mr Kwan to share the nett profit of the main contract in the following proportions:

(a) the second appellant — 30%;

(b) the third appellant — 30%;

(c) Mr Kwan — 30%; and

(d) the fourth defendant — 10%.

[19] The contention was based on the following facts:

(a) the plaintiff company was only meant to be a vehicle for the distribution of the profit from the QEH project in the proportion of their respective shareholdings;

(b) the subcontract agreement was not intended to be binding and was only meant as a comfort/security for Mr Kwan's share and in consideration of him agreeing to stand as guarantor for the bank loan obtained to finance the first defendant in carrying out and completing the QEH project; and/or

A (c) in any event, that the subcontract agreement had been cancelled by mutual agreement on 25 February 2011.

[20] The whole thrust of defendants' argument in these appeals is encapsulated in the following para 12 of counsel's written submissions:

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> 12. The trial revolve around the interpretation of the said SCA and whether the same was intended to be a valid subcontract to be performed or was merely as contended by the Appellants a vehicle for the implementation of the Actual Agreement and/or as a comfort security for Kwan with respect to his 30% share of the nett profit from the Project Contract Sum. Alternatively whether the same had been cancelled.

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[21] By 'actual agreement', learned counsel was referring to the agreement that was entered into between the four players with the goal of making profit D from the awarded QEH project, ie between the second to the fourth defendants and Mr Kwan and did not involve the plaintiff company at all.

[22] The defendants categorically denied that there was an agreement between Mr Kwan and the second, third and fourth defendants to work E together towards procuring the QEH project. Their case was that they had only agreed to the terms of the subcontract agreement drawn up by the second defendant and that the agreement was undated.

F **[23]** This was pleaded in para 6 of the statement of defence where it was averred that the defendants had only agreed to the terms of the undated subcontract agreement drafted by the second defendant where there was no term subcontracting the whole of the QEH project to the plaintiff company. The contention was that the subcontract agreement entered into between the G first defendant and the plaintiff was a sham and not meant to be performed.

[24] The plaintiff company's answer to this allegation was that there is no evidence that the board of the plaintiff company had made any resolution that the subcontract agreement was not meant to be performed. Reference was H made to the following Q&A of the third defendant during cross-examination:

> Q: Was there any resolution passed before the execution of the sub contract Agreement of either Techbay or Medicbilt to say that the sub contract Agreement not to be enforced?
>
> I A: Nobody discuss with me so I don't know.

[25] It was argued in the alternative by the defendants that in any event, on or about 25 February 2011, the board of directors of the plaintiff company had resolved to cancel the subcontract agreement and this is evidenced by the

minutes of meeting at which meeting Mr Kwan was present and had acquiesced to the decision.

[26] As proof of the cancellation of the subcontract agreement, learned counsel for the defendants drew our attention to the fact that on 19 June 2012, the second, third and fourth defendants transferred all their shares in the plaintiff company to Mr Kwan and his late wife and resigned from its board of directors. It was argued that if indeed the subcontract agreement had not been cancelled, the second, third and fourth defendants would not have transferred all their shares and relinquish all their rights in the plaintiff company.

THE DEFENDANTS' COMPLAINT

[27] The defendants' main complaint against the manner in which the learned judge dealt with the evidence was that he adopted a 'flip flop' approach in arriving at his conclusion on the plaintiff's claim in that:

(a) having decided that the contract was between the first defendant and the plaintiff and that the agreement was that of a subcontract, he failed to give any or adequate consideration to the terms of the subcontract agreement which expressly provided firstly that only part of the works in the QEH project was subcontracted to the plaintiff for the subcontracted sum stated in Appendix 1 thereto and secondly, that the subcontracted works was in fact re-subcontracted or returned to the first defendant;

(b) he instead accepted the plaintiff's claim that the agreement between the first respondent and the plaintiff was that the whole of the works under the QEH project was subcontracted to the plaintiff for the amount of the QEH project contract sum based only on the oral evidence of Mr Kwan. The learned judge was therefore 'clearly in error' in preferring such oral evidence and ignoring the terms of the documentary evidence. In doing so, the learned judge had in effect accepted that the terms of the agreement between the first defendant and the plaintiff was as per the actual agreement; and

(c) he perversely rejected the defendants' claim that the agreement between the parties was the 'actual agreement' on the basis that there was no contemporaneous document or board resolution to support the same, stating that he 'cannot permit any parol evidence of the matter'.

[28] It was submitted that due to the wrong approach adopted by the learned judge, he failed to consider and appreciate that the first defendant was in fact not in breach of the subcontract agreement when it carried out and completed the QEH project works including the subcontracted works under the subcontract agreement.

[29] In stressing the point that there was no agreement between Mr Kwan and the second, third and fourth defendants to work together towards procuring the QEH project, learned counsel's contention was as follows:

(a) the sum ordered by the learned judge was wrongly premised on the amount of profit that the first defendant would have received under the main contract;

(b) the learned judge was wrong in finding that the plaintiff had proved its damages;

(c) while accepting that lobby fees were indeed paid to 'introducers' or 'lobbyists' as a necessary evil, the learned judge erred in allowing only a sum of RM9,228,229.12 to be deducted from the purported loss awarded to the plaintiff; and

(d) the learned judge failed to give due and full consideration to the facts and circumstances in finding that the the second, third and fourth defendants had jointly and several assisted, allowed, colluded with the first defendant in disregarding and frustrating the performance of the agreement.

[30] The ultimate contention by the defendants was that the judgment of the High Court should not be allowed to stand as the learned trial judge had ignored all contemporaneous evidence which, according to the defendants, had proved the following facts against the plaintiff:

(a) there was no subcontract agreement as parties had agreed to cancel and replace the subcontract agreement;

(b) the privity of contract was between the second, third and fourth defendants and Mr Kwan; and

(c) there was no consideration provided by the plaintiff company to the subcontract agreement.

[31] The contemporaneous documents that the defendants alleged that the learned trial judge ignored were in relation to the following facts:

(a) that the parties' dealings and modus operandi had always been personal in nature in that the companies incorporated, the plaintiff company included, were mere vehicles for the parties' ventures. These companies, the plaintiff company included, had never provided any form of consideration whatsoever;

(b) that the plaintiff company was a shell and dormant company that was never capable, financially or otherwise, to carry out the QEH project;

(c) that the plaintiff company had never provided any consideration whatsoever in order to benefit from the subcontract agreement and that

any contribution in terms of machineries, know-how, bank facilities et cetera would come from the defendants and Mr Kwan;

(d) that the plaintiff company had never requested for site possession in accordance with cl 5.1 of the subcontract agreement;

(e) that no bank account was ever opened for the plaintiff company and Mr Kwan had never written or requested that the defendants proceeded to take site possession and proceed to open a bank account for the plaintiff company;

(f) that Mr Kwan had even refused to sign the subcontract agreement which he now claimed the full benefit from;

(g) that Appendix 1 and cl 1 of the subcontract agreement had clearly been tampered with and that not everyone had signed the subcontract agreement and Appendix 1 of the subcontract agreement;

(h) that the first defendant's letter dated 6 January 2011 stated in very clear terms that there was no subcontract agreement between the first defendant and the plaintiff company. There was no reply by the plaintiff company;

(i) that the fourth defendant then lodged a police report on 12 January 2011 on this matter;

(j) that a directors meeting was called on 25 February 2011 wherein it was resolved that the subcontract agreement be replaced;

(k) that there was never any complain that the fourth defendant had authorised Mohd Murdee bin Matlin to attend the said directors meeting on his behalf;

(l) that there was no dispute or complain that the agenda for the meeting was not understood or misleading;

(m) that there was a clear resolution passed by majority of the plaintiff company's director;

(n) that the plaintiff company had on 1 March 2011 sent the resolution of this board meeting to Messrs Wong & Shim (the solicitor preparing the loan documents) stating in clear terms that parties had agreed to replace the subcontract agreement;

(o) that Mr Kwan never protested to this letter dated 1 March 2011 and the plaintiff company equally never insisted on the performance of the subcontract agreement;

(p) that the plaintiff company never protested to UOB Bank on the contents of the letter dated 1 March 2011 in which it was clearly stated that the board of directors of the plaintiff company had agreed to cancel the subcontract agreement;

(q) that Mr Kwan had on 7 March 2011 written to the plaintiff company stating in clear terms and confirming that at the meeting on 25 February 2011, the board had agreed to replace the subcontract agreement. In the same letter Mr Kwan insisted that the plaintiff company prepare a new agreement as soon as possible. The plaintiff company and Mr Kwan never insisted that the subcontract agreement be performed until a new agreement was signed;

(r) that DW1 had testified that the loan was drawn down on 3 May 2011, after the first defendant had accepted the plaintiff company's termination of the subcontract agreement;

(s) that there was never any protest whatsoever by Mr Kwan when the loan was drawn down;

(t) that the undisputed evidence shows that as early as October 2010 there were email correspondences between Mr Kwan's legal advisor and DW3 (Ms Alice Lim) on the drafting of the shareholders' agreement and by March 2011, in an email dated 22 March 2011, the parties had clearly demonstrated that the subcontract agreement was cancelled and to be replaced;

(u) that the contemporaneous evidence ie in the email between DW3 and Ms Song Wei Wan (Mr Kwan's legal advisor) clearly shows that it was Mr Kwan who had wanted the plaintiff company to be replaced with another company;

(v) that from March 2011 onwards, the plaintiff company was no longer in the picture as far as the proposed new agreement was concerned;

(w) that the final deed of assignment was drafted and finalised wherein the first defendant was to assign the project to a new company called Thousand Mission Sdn Bhd. The share ownership in Thousand Mission Sdn Bhd was exactly the same as the share ownership in the plaintiff company;

(x) that in June 2012, Mr Kwan and his late wife gained full control of the plaintiff company. No cause of action was filed by the plaintiff company even though Mr Kwan had gained full control of the plaintiff company;

(y) that in 2013, Mr Kwan instituted an action against the defendants based on an oral agreement that he was entitled to 30% profit from the QEH

project. The plaintiff company was never in the picture and there was never any issue of the second, third and fourth defendants ever in breach of their fiduciary duties;

(z) that subsequently Mr Kwan applied to amend the 2013 suit and added the plaintiff company, but at all times he maintained the oral agreement and also his 30% shares. There was no mention of the second, third and fourth defendants ever being in breach of their fiduciary duties;

(aa) that as the trial was about to commence, Mr Kwan withdrew the 2013 suit and filed the present case and based its claim on the subcontract agreement which all parties had agreed to cancel and be replaced. This was clearly evidenced by the contemporaneous documentary evidence especially the letter dated 7 March 3011 written by Mr Kwan to the plaintiff company which was a week after the board meeting;

(ab) that the learned judge had ignored a letter written by the plaintiff company dated 5 May 2015 wherein it was stated clearly that the plaintiff company agreed to the contents of the amended statement of claim for the 2013 suit (ie based on the oral agreement and that there was no breach of fiduciary duties);

(ac) that the learned judge ignored the fact that the initials in Appendix 1 and the signatures of Mohd Sahril bin Jarael (DW4) and the fourth defendant were either forged or did not sign Appendix 1, hence, the fact that cl 4.1 of the subcontract agreement was tampered with remained undisputed;

(ad) that the learned judge ignored and misdirected himself on the contemporaneous evidence in that when cross-examined, Mr Kwan, the plaintiff company's main witness in fact agreed to the fact that the real agreement was between him and the second, third and fourth defendants; and

(ae) whilst the learned judge acknowledged that Mr Kwan and the second and fourth defendants had all worked together to secure the QEH project and for the first defendant to later subcontract the works to the plaintiff company, he however misdirected himself in failing to appreciate that this only proved the defendants' case that the contract was actually between Mr Kwan and the second and fourth defendants orally, meaning, the plaintiff company was conferred a benefit which it was not entitled to sue under the agreement. This in fact was consistent with Mr Kwan's first and immediate cause of action in 2013.

APPELLATE INTERVENTION

[32] It is indeed a very long list of errors allegedly committed by the learned trial judge. What immediately struck us with regard to the base line of the defendants' argument is that the issues raised relate, one way or another,

directly or indirectly, to questions of fact that the learned trial judge had found in favour of the plaintiff. The defendants were in fact urging upon us to displace those findings of fact with our own findings.

[33] The principle on appellate intervention in an appeal of this nature is well settled, that an appellate court is always slow to interfere with findings of fact made by the trial court, unless it can be shown that it had seriously misapprehended the facts to the prejudice of the party against whom the findings were made. The burden is on the party who attacks such findings to convince the court that the misapprehension of the facts had resulted in a grave miscarriage of justice, and not just any error that does not go to the root of the matter.

[34] Perhaps it is necessary for us to quote in extenso (if only to refresh our minds on the principles involved) the following speech by Lord Fraser of Tullybelton in delivering the decision of the judicial committee of the Privy Council in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b, a case that emanated from Malaysia, at pp 41–42:

> The trial judge's decision on the first question, the question of fact, was reached after he had heard a considerable volume of evidence, some of it sharply conflicting, and had accepted the appellants' evidence, and rejected the respondent's. The principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact have been stated in many cases in the House of Lords and in this Committee, and it will be appropriate to quote from two of them. In *Watt or Thomas v Thomas* [1947] AC 487 at p 487 Lord Thankerton said this:
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> > (1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."
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> That passage was quoted with approval in the judgment of this Board, delivered by Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 at p 92. When Lord Thankerton referred in para (1) to 'the printed evidence' he was referring to a transcript of a verbatim shorthand record of the evidence, such as was

available in that case. But in the instant appeal all that the Federal Court had before it was the judge's notes of the evidence, perhaps augmented in places by a transcript of shorthand notes, and it is obvious that the disadvantages under which an appellate court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it has a verbatim transcript.

The second case from which it is appropriate to quote is *Powell and wife v Streatham Manor Nursing Home* [1935] AC 243 at p 249 where Viscount Sankey LC said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. *On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses:* see *Clarke v Edinburgh Tramways Co per Lord Shaw* 1919 SC (HL) 35, 36, where he says:
>
> > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? *In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put to himself, as I do now in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind*

A *that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment*. (Emphasis added.)

[35] In *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, a case that was decided before *Choo Ah Pat* (going by the year of citation), Raja Azlan Shah FJ (as His late Royal Highness then was) in a dissenting judgment raised the question of whether an appellate court should substitute its own views of the facts for that of the trial judge. His Lordship then went on to say:

> For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal is by way of rehearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its views of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of facts unless it is convinced that it is wrong. *If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge.* (Emphasis added.)

THE DETERMINATIVE ISSUE

[36] In the appeal before us, it is plain and obvious that the determinative issue was whether there existed a valid agreement between the first defendant and the plaintiff company to subcontract the whole of the QEH project to the plaintiff company and if so whether the terms of the agreement had been breached by the first defendant.

[37] If the subcontract agreement existed as a matter of fact, and that the first defendant breached the terms of the agreement, the plaintiff would be entitled to judgment as such finding would destroy the whole substratum of the defendants' case.

[38] There was an acute conflict of evidence between the parties on this crucial question of fact, with the evidence of the defendants being diametrically opposed to the evidence given on behalf of the plaintiff company. But as we mentioned, the issue was decided squarely in favour of the plaintiff. The question is whether the learned trial judge was plainly wrong in making such finding of fact. On the evidence before him, we do not think so. He had sieved through the evidence with meticulous care and came to the following conclusion:

> Contrary to the claim by the Defendants, I find that the sub contract agreement

dated 16th August 2010 executed between the plaintiff and the first defendant do exist. That agreement has to be read on its own. The defendants had asserted that this agreement was merely meant as a security for the bank guarantors. There are however no contemporaneous documents to corroborate this. There are no board resolutions on this matter. I cannot permit any parol evidence on this matter. The agreement is a sub contract agreement entered and executed between the plaintiff and the first defendant. I am not persuaded that this sub contract agreement is merely meant as a security for the bank guarantors. In any event the defendant's argument on this issue has never been pleaded.

[39] Clearly, this was a finding that was reasonably open to the learned judge to make on the evidence before him. His Lordship then went on to consider whether the subcontract agreement had been cancelled, as alleged by the defendants. He found the allegation to be unfounded and reasoned as follows:

A plain reading of the minutes of meeting very clearly showed that the sub contract agreement of the 16 August 2010 was not cancelled. I cannot imagine how it can be construed by anyone reading the said minutes can sanely conclude that the agreement of the 16 August 2010 was resolved and cancelled by that director's meeting.

See also the evidence of DW1 Raymond Wong, solicitor for the bank. At pp 248 lines 6846–6847 NOP, DW1 said he was not sure if the sub contract agreement had in law been properly terminated. And at p 257 line 7117 on being cross-examined, DW1 said there was no express resolution cancelling the said agreement.

Further even if not pleaded by the plaintiffs, I cannot see how that meeting could be said to be valid now knowing fully well that one Mohd Murdee bin Matlin attended and took part in the meeting when he is not and never have been validly appointed as an alternate director to the fourth defendant Teoh Kim Lee. It is obvious to me that meeting is void in any event.

I agree with the plaintiff's submission on this issue. In fact the plaintiff had submitted eight grounds to deny that the sub contract agreement was cancelled by the board of directors at the meeting held on 25 February 2011. I have also gone through the defendants' submissions on this. Needless to say I must agree with the plaintiff.

Be that as it may I find no cancellation of the 16 August 2010 sub contract agreement. It is valid and is in existence at all material times.

[40] We have no reason to disturb this finding of fact. It was also the learned judge's finding that the second, third, and fourth defendants together with DW4 Mohd Sahril bin Jeraie ('Mohd Sahril') had ganged up against Mr Kwan, thus making it impossible for Mr Kwan to implement the subcontract agreement. This is what the learned judge said:

I agree, with the second, third and fourth defendants ganging up with DW4, it would be impossible for Kwan to implement the sub contract agreement. I further agree given the above the defendants are estopped from alleging that the plaintiff

had acquiesced to the continuing disregard and breaches of the agreement.

TAMPERING OF CONTRACT DOCUMENT

[41] Among the more serious allegations that the defendants made against the plaintiff company was that cl 4.1 of the subcontract agreement was tampered with or altered by Mr Kwan without the defendants' consent, which resulted in the lodging of a police report by Mohd Sahril of the first defendant's directors. It was contended that due to the tampering, the subcontract agreement was, in any event, not binding on the defendants.

[42] Clause 4.1 of the subcontract agreement is couched in the following language:

> 4.1 The Sub-contract Sum payable to the Sub-Contractor by the main Contractor shall be in the same as described in the Appendix 1. This is to be paid by the Contractor to the Sub-Contractor in the manner and period as stipulated in this Clause herein.

[43] The tampering of cl 4.1 was alleged to have been done by Mr Kwan by adding cl 4.1A to the subcontract agreement. The additional cl 4.1A reads as follows:

> 4.1A In consideration of the terms of this Agreement the Sub-Contractor shall sub-contract the works under Items 1, 2 and 3 of Appendix 1 to the Main Contractor in the sum as provided for in the 'Sub-Contractor Sum' in Appendix 1 whereby the Main Contractor shall manage, construct and complete the sub-contract works and payments shall be in accordance to the terms and conditions in accordance to this Agreement.

[44] Clause 4.1A was thus set out in the form of an addendum to be incorporated into the subcontract agreement. In this regard, the learned trial judge's finding was that all parties (four signatories from the plaintiff company and two from the first defendant) had signed the subcontract agreement.

[45] It is true, as pointed out by learned counsel for the defendants, that Mohd Sahril did not initial on Appendix 1 but the learned judge's conclusion was that the absence of his initial was of no consequence as he had also signed the subcontract agreement which made reference to Appendix 1. This puts paid to the defendants' assertion that Appendix 1 was not attached to the subcontract agreement at the time Mohd Sahril signed the agreement.

[46] Mr Kwan's unchallenged evidence was that it was the second and third defendants who wanted the addendum to the subcontract agreement for the purpose of carrying out the preliminaries, building works and external works

under items 1, 2 and 3 of Appendix 1 in place of the plaintiff. It was his testimony that the reason why he agreed to amend the subcontract agreement was to allow the first defendant to carry out the civil works in place of the plaintiff company.

[47] We had, on a date subsequent to and after reserving judgment to a date to be fixed, written to the parties to confirm in writing if cl 4.1A (the addendum) was pleaded. The plaintiff's response was that this clause was not pleaded by both parties but that by paras 6–7 of the statement of defence, the defendants pleaded that cl 4.1 was tempered with without their consent and knowledge.

[48] We reproduce below paras 6–7 of the statement of defence:

> 6 ... the Defendants aver that clause 4.1 of the alleged sub-contract agreement was tampered with and/or altered without the consent of the defendants or any of them. As a result thereof, the 1st Defendant through its director one Mohd Sahril B Jeraie has lodged a police report on the 12.01.2011.
>
> 7 ... the Defendants state that the sub-contract agreement as drafted by the 2nd Defendant was materially different in its Appendix 1 and clause 4.1 from that pleaded by the Plaintiff under paragraph 7. It is Kwan who without the consent and/or authority of the Defendants amended the sub-contract agreement. Accordingly, the sub-contract agreement is not binding on the Defendants.

[49] The plaintiff's reply to the above defence is at paras 5–6 of the reply, as follows:

> 5 The Plaintiff denies paragraph 7 of the Statement of Defence that the said Sub-Contract Agreement was amended. The Plaintiff states that the proposed amendment of clause 4.1 of the said Sub-Contract Agreement was intended to confer a benefit on the 1st Defendant, but this proposed amendment failed to materialise by reason of the refusal of the 2nd Defendant to endorse the same.
>
> 6 The Plaintiff says that the 2nd Defendant now attempts to fraudulently use his own refusal to endorse the proposed amendment to say that even the original un-amended Sub-Contract Agreement is void by reason that the proposed amendment was not approved by him.

[50] We had also requested the parties to confirm if cl 4.1A was referred to by any witness at the trial and if so what was their evidence relating thereto. In response, learned counsel for the plaintiff, after referring to the testimonies of the relevant witnesses, submitted as follows:

> From the above, it could be seen that the position taken by the Appellants during the trial was that Techbay and Chu did not sign the addendum and that Kwan had unilaterally incorporated it into the Sub-Contract Agreement without Techbay's consent. The Appellant's subsequent reliance on the addendum containing clause

A 4.1A to contend that items 1, 2 and 3 had been re-sub-contracted back to Techbay, is clearly inconsistent with their earlier attempts in the High Court to renounce the proposed amendment identified as clause 4.1A.

B **[51]** At the trial the common position taken by the parties was that cl 4.1A was not applicable, but for different reasons. The defendants' position was that cl 4.1A was not applicable to the subcontract agreement as the attachment of an addendum incorporating the clause amounted to a wrongful tampering of cl 4.1.

C **[52]** We refer first to the position taken by the first, second and third defendants on the applicability of cl 4.1A at the High Court as expressed in paras 36(b), (d) and 39 of their written submissions:

D 36(b) That Sahril (DW4) has clearly on or about 12th January 2011 (see pages 10 to 11 of Bundle B) lodged a police report pertaining to the fact that this purported sub-contract agreement was never intended to be used and that clause 4.1 has been tampered with.

(d) Further, as shown in page 36 of Bundle C, clause 4.1 has been tampered with...

E 39. Looking at the facts of this case and also the possible forgery that was involved especially in the tampering of clause 4.1 of the purported sub-contract agreement, it can clearly be seen even to the naked eye that DW4 and Teoh's alleged initials to ... Clause 4.1A of the sub-contract agreement are clearly different (see pages 9, 21, 22 and 36 of Bundle C). DW4 lodged a police report to the effect that clause 4.1 has
F been tampered with ...

[53] The fourth defendant on his part supported the first, second and third defendants' position that cl 4.1A was not applicable to the subcontract agreement as the defendants had not agreed to the proposed amendment. It
G was submitted that by inserting cl 4.1A unilaterally, Mr Kwan had altered the character of the subcontract agreement.

[54] The plaintiff's position on the other hand was that although its directors, ie the second, third and fourth defendants had initially agreed to the
H proposed addendum, it was not put into effect due to the first defendant's disagreement and also due to the second, third and fourth defendants' allegation that the original cl 4.1 was tampered with by Mr Kwan's unilateral act of attaching the addendum, ie cl 4.1A to the subcontract agreement. This
I was how it was argued by the plaintiff:

33(ii) The Defence's second ground that clause 4.1 was tampered with is frivolous because:

(a) The proposed addendum which contained a proposed amendment to clause 4.1 [see: Part C p 9] was meant to allow Techbay to carry out the

civil works (under items 1, 2 and 3 of Appendix 1 of the said SCA) which would otherwise have been carried out by the Plaintiff.

(b) Kwan (PW5) claims that this proposed amendment and addendum were prepared at the request of Chu (DW10) and Yong (DW2) [see: NOP p 137 Q&A 39]. That was why Yong (DW2) and Teoh (DW12) had also initialed the addendum. Kwan had expected Chu and Techbay to sign the addendum but only learnt that they claimed to have changed their mind after Mohd Sahril (DW4) lodged a police report in January 2011 alleging that the addendum was added to the said SCA without their consent [see: NOP p 138 lines 3663–3667].

(c) The Plaintiff submits that when the Defendants reneged on their agreement to the proposed amendment to clause 4.1 in January 2011, the proposed amendment is then of no effect and should be ignored. Thereafter, the said SCA remained unaffected and valid in its original form.

(d) The fact that the addendum was attached to the said SCA in the belief that all parties had agreed to the proposed amendment cannot be said to be an act of tampering of the said SCA which would invalidate the same.

[55] Thus, whilst the defendants' position was that the subcontract agreement had been rendered invalid due to the tampering of cl 4.1 (and therefore not binding on them), the position taken by the plaintiff through the evidence of Mr Kwan was that since the first defendant disagreed with the proposal to amend cl 4.1, the proposed amendment (cl 4.1A) should be disregarded and the subcontract agreement remained valid in its original form.

[56] The learned trial judge did not refer to cl 4.1A at all in his grounds of judgment, perhaps due to the fact that it was not pleaded by the parties. With due respect to the learned judge, although it was not pleaded, any discussion on the effect of cl 4.1 would be incomplete without reference to cl 4.1A, especially in the light of the stand taken by the defendants as reflected in the following submissions:

37(6) By clause 4.1A, the parties agreed that 'In consideration of the terms of this Agreement the Sub-Contractor shall sub-contract the works under Items 1, 2 and 3 of Appendix 1 to the Main Contractor in the sum as provided for in the 'Sub-Contractor Sum' in Appendix 1 whereby the Main Contractor shall manage, construct and complete the sub-contract works and payments shall be in accordance to the terms and conditions in accordance to this Agreement'. Therefore by this clause, in effect the Respondent had waived/abandoned the sub-contract agreement. Alternatively, the Respondent had re-subcontracted the sub-contracted works back to the 1st Appellant for the exact same sum.

38. Therefore by the terms of the said SCA the 3 sub-contracted Works were in fact to be done and completed by the 1st Appellant for the same amount as the sub-contract sum and thus no amount is due to the Respondent.

A ...

48. As submitted above, by clause 4.1A of the said SCA (see page 106 of the ACB Vol 1/page 1376 of ROA Vol 8), the Respondent had in fact re-subcontracted back to the 1st Appellant the works that were purportedly sub-contracted to them for the exact same amount as the Sub-contracted Sum. Therefore the Respondent had not
B suffered any damage at all.

[57] The evidence on cl 4.1A was clearly before the learned judge and there was no argument that the evidence was irrelevant or inadmissible or that for
C some reason it ought to be disregarded. It was therefore the duty of the learned judge to consider the evidence, along with the other evidence that had a bearing on the issue.

[58] We must hasten to add however that the failure by the learned judge to
D refer to cl 4.1A does not detract from the fact that he had found the subcontract agreement to be in existence and was binding on the first defendant. This finding was made independent of cl 4.1A.

[59] Given the defendants' position that the subcontract agreement was
E invalid and not binding on them by reason of the tampering of cl 4.1 (they said the first and third defendants did not sign the addendum), they cannot now be heard to say that the provisions of cl 4.1A applied to their favour.

CLAUSE 4.1 OF THE SUBCONTRACT AGREEMENT

F

[60] What applies then is cl 4.1 of the subcontract agreement in its original form, ie minus cl 4.1A, which means the operative clause for the purposes of determining whether the main contract had been subcontracted to the plaintiff would be cl 4.1 in its original form.

G

[61] For ease of reference, we reproduce again cl 4.1 of the subcontract agreement:

4.1 The Sub-contract Sum payable to the Sub-Contractor by the main Contractor
H shall be in the same as described in the Appendix 1. This is to be paid by the Contractor to the Sub-Contractor in the manner and period as stipulated in this Clause herein.

[62] Recital (f) of the subcontract agreement provides that the plaintiff
I company was appointed as subcontractor 'to carry on and complete part of the works under the main contract as described in Appendix 1'.

[63] It was pointed out by learned counsel for the defendants that in the third column of Appendix 1 (under the heading 'name of subcontractor') the

works subcontracted to the plaintiff company were only items 1–3, being preliminaries (RM18,168,964.16), building works (RM69,830,969.40) and external works (RM2,449,936.58). In other words, not the whole of the QEH project was subcontracted to the plaintiff company.

[64] In this regard, we agree with learned counsel for the plaintiff company that although Appendix 1 appears to be poorly worded, it nevertheless sets out, in the context of the subcontract agreement, the complete scope of works under the agreement and the total subcontract price. It even sets out the estimated cost of completing some of the items of works and the corresponding estimated profits to be made by the plaintiff company from each of the items of work.

[65] Under items 1, 2 and 3 for example, the total contract price for these three items was RM120m (column 5), the estimated costs of carrying out these three items was RM90m (column 6), and the resulting profit was RM30m (column 7).

DAMAGES

[66] On the issue of damages, the first defendant's allegation was that the learned judge erred in awarding damages to the plaintiff company for the following reasons:

(a) the award of damages was based on an estimation of profit;

(b) the plaintiff company did not actually suffer losses; and

(c) allowing the award amounted to unjust enrichment.

[67] It was argued that the sum ordered by the learned judge was wrongly premised on the amount of profit that the first defendant would have received under the main contract, when it should have been on the basis of the profit that the plaintiff company as a subcontractor would have made under the subcontract agreement had the plaintiff company carried out the subcontracted works under the subcontract agreement.

[68] Compensation for any loss or damage caused by the breach of a contract is governed by s 74(1) of the Contracts Act 1950 which provides as follows:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused by him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[69] The plaintiff company's argument was that the loss or damage which naturally arose from the breach of the subcontract agreement by the first defendant was the profits that they would have earned if the QEH project had been successfully completed by them, relying on the following passage in the Supreme Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76:

> We are, therefore, of the view that the loss of profits on the housing project which the first respondent would suffer was the natural and probable result of the breach of agreement by the bank ... the bank well knew of the loss that the first respondent would incur should the bank break the contract.

[70] Having gone through the evidence, the learned trial judge computed damages in the following manner:

> As for the final accounts found at PSBOD at p 2222, the pre-tax profits from the QEH project is listed as RM31,155,026.00. If we total the amounts: RM31,155,026.00 + RM42,154,600.00 + RM5,982,175.00 = RM79,291,801.00.

[71] However, since the plaintiff company had only claimed for RM69,572,200 in its prayer (i), the learned judge could not grant this higher figure of RM79,291,801.

[72] The plaintiff company relied on the testimonies of two quantity surveyors, namely Datuk Malaya (PW1) and Francis Tan (PW6) whose evidence was that the estimated profits earned would range between 20–29% of the contract sum awarded. The learned judge preferred their evidence to that of the defendants' witness, Lee Lai Chee (DW5), and he had given his reasons for his preference.

[73] The award of damages based on a percentage of the contract value was accepted by this court in *Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593 (CA) where Low Hop Bing JCA delivering the judgment of the court said:

> We are of the view that the plaintiff's claim for damages was supported by the estimate and the consequential computation of 25% of the contract value for the development of the agricultural land into an oil palm plantation in accordance with the contract ...

[74] The learned trial judge did not rely on any estimate in awarding damages. He relied on the defendants' own admission of their profits derived from the QEH project which amounted to RM79,291,801, which included the alleged donations paid out to subcontractors under fictitious claims. The first defendant had, on 30 August 2016, submitted its project accounts pursuant to a court order dated 9 August 2016 whereby the first defendant

declared that it had made a pre-tax profit of RM31,155,016.

[75] The evidence shows that in addition to the declared profits in the said project accounts, a further sum of RM42,154,600 plus a miscellaneous sum of RM5,982,175 totaling RM48,136,775 were falsely included in the project accounts as 'subcontract fee'. The first defendant's accountant (DW8) admitted that these sums were not paid to subcontractors.

[76] As for the defendants' contention that allowing the award amounted to unjust enrichment, apparently the learned judge did not deal with the issue. Be that as it may, we accept learned counsel's argument that there was nothing unjust for the learned judge to award the plaintiff company damages for the loss of profit which it was entitled to under the subcontract agreement.

THE PLAINTIFF'S CROSS-APPEAL

[77] We shall now deal with the plaintiff company's cross-appeal. In arriving at the award of damages of RM60,343,970.88, the learned judge deducted a sum of RM9,228,229.12. The reason why the learned judge deducted this amount from the plaintiff company's claim was due to the fact that the QEH project had been awarded to the first defendant because lobbying fees were paid to the lobbyist, Datuk Bung Mokhtar. The sum involved was RM56m out of which 10% went to Datuk Bung Mokhtar and 6% to officials of the Ministry of Health.

[78] The position that the plaintiff company took with regard to this issue was that it was an afterthought and brought up by the defendants to cover the payments of non-existent and fictitious claims, discovered by PW3 Chen Siong Foo from the records of the first defendant. The discovery by PW3 was only made possible when, on the application of the plaintiff company, the High Court ordered the production of all books, financial documents and accounts to be made available to the plaintiff company for inspection.

[79] It was submitted that the lobbying fees was a red herring conjured up by the defendants in a dishonest attempt to inflate the expenses of the QEH project when in truth the second, third and fourth defendants had pocketed the monies for themselves.

[80] The defendants' case was that payment of the lobbying fees was a 'necessary evil' as part of the arrangement to secure the award of the QEH project and that it was agreed amongst Mr Kwan and the second to the fourth defendants that funds from the previous projects undertaken by three other companies related to the first defendant would be utilised to pay for the lobbying fees. The defendants produced the document at D2 which contained

A the details of all payments paid to the lobbyist and others.

[81] At the trial, the plaintiff company's witness PW5 confirmed that the lobby fees was 16% of the sum awarded for the QEH project. The relevant part of PW5's evidence was as follows:

B

Q95: Are there any reasons you say that the final project account is inaccurate?

A: Yes, during the negotiations between myself, Chu and Yong for a global settlement sometime in 2012 and 2013, they wanted me to allow for (exclude from consideration) a sum equivalent to 16% of the sum awarded for the QEH Package 4, totalling approximately RM56 million. They claim that they had to pay this sum to some undisclosed person for successfully lobbying for QEH Package 4.

C

D

[82] The third defendant's evidence was that he handed the 10% lobbying fees to Datuk Bung Mokhtar. This however was disputed by Mr Kwan. It was his 'belief' that the second, third and fourth defendants had siphoned out the sum of RM56m from the profits derived from the QEH project and falsely claimed that these profits were paid out to Datuk Bung Mokhtar and the Health Ministry officials as lobbying fees.

E

[83] The plaintiff company's contention was that the defendants should not, in any event, have paid the 16% since lobbying fees are illegal and contrary to public policy, irrespective of whether Mr Kwan knew that lobbying fees were a 'necessary evil' to secure government projects.

F

[84] It was the plaintiff company's submission that the learned trial judge was wrong to infer that the QEH project was awarded by the Ministry of Health to the first defendant because of the lobbying effort by Datuk Bung Mokhtar. It was argued that this inference was incorrect as there was no evidence as to the nature of the alleged lobbying, what the lobbying effort entailed, and whether the award of the QEH project was indeed the result of the lobbying by Datuk Bung Mokhtar.

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H

[85] It was submitted that the only reliable way to show that the award of the QEH project to the first defendant was due to the effort of the lobbyist was, at the very least, to call Datuk Bung Mokhtar to confirm if he had lobbied for the QEH project and what this lobbying activity entailed.

I

[86] Were lobbying fees actually paid by the defendants? If they were, then the learned judge was right in allowing for a deduction of RM9,228,229.12 from the plaintiff company's total claim of RM69,572,200. The learned judge's finding was that the lobbying fees were in fact paid. He based his conclusion on

the document at D2 which contained details of all payments made to the lobbyist and others. The date, the manner of payment, the cheque numbers, the name of the bank, the amounts and the sources of the funds were all recorded in D2. Cash advances were also recorded.

[87] The learned trial judge's finding was therefore amply supported by the evidence. In the circumstances, we find no reason to disturb his finding of fact on this issue. We agree with the defendants' explanation that the reason why they did not call Datuk Bung Mokhtar to give evidence was because Datuk Bung Mokhtar would never admit to receiving the lobbying fees, and not because they wanted to suppress evidence.

[88] The learned judge was right in the circumstances in not invoking adverse inference under s 114(g) of the Evidence Act 1950 against the defendants for not calling Datuk Bung Mokhtar, bearing in mind the invocation of the provision is at the discretion of the trial court.

CONCLUSION

[89] For all the reasons aforesaid, we find no merit in both the appeals and the cross-appeal. Consequently, the appeals and the cross-appeal are dismissed. Parties to bear their own costs. The deposits are to be refunded, if paid.

Appeals and cross-appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali